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No. 93-852

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLARK MERSHON, PAUL MERSHON &
GARY MERSHON

Petitioners,

vs.

MISSOURI FARMERS ASSOCIATION
WILLIAM BEASLEY, AND
BRIAN GRIFFITH

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. Petitioners' Response to Respondent's Summary of Facts.

The majority of Respondents' opposition is simply a weak attempt to disparage without any legitimate basis Petitioners' Statement of Facts which is completely accurate and supported by the

record in this case as indicated herein. For their response to Respondents' Counter Statement of Facts, Petitioners state the following:

Respondents claim[1] the Eighth Circuit stated in two brief paragraphs all relevant facts in this case. Petitioners disagree. The opinion not only fails to set forth all the relevant facts, but those facts set forth are not supported by the record. The critical relevant facts omitted by the Eighth Circuit include:

1. Jenkins'--the prosecutor--refusal to withdraw despite his clear conflict of interest because the proceeds MFA claimed were from his father's, W.K. Jenkins', farm. (Vol.IV, p.38 and 137).[2]

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[1] Respondents' Br. at p. 1-2.

[2] All references to "Vol." reference the trial transcript.

2. MFA's in-house attorney, Griffith, stated to Mershons' attorney, Howard, MFA filed the criminal charges to preserve an exception to discharge should the Mershons seek protection of the bankruptcy court and that "restitution would appease the prosecutor." (Vol. IV, p. 33).

3. Howard testified Cullen Cline, another MFA attorney told her MFA could make the criminal charges go away if debt in the MFA civil suit was paid. Cline drafted a letter to Howard (not sent) but admitted in evidence in which he represented MFA would be in a position to make efforts to have the criminal charges against the Mershons dismissed.[3]

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[3] The trial court refused this evidence despite the fact it showed the "essence of the common plan". (Vol. IV, p.7-11; Ex.176 & 176A).

4. On June 15, 1987 there was a telephone conversation between Beasley and Jenkins memorialized in a memo by Beasley stating: "6-15-87. Called Hugh Jenkins - he advised Mershons will be arraigned either next week or following week & will advise of progress. They to try to make Mershons make restitution" (Ex.42). On July 16, 1987 there was a second telephone conference between Jenkins and Beasley in which Jenkins tells Beasley warrants are to be issued for the Mershons' arrest the next day; Beasley's memo of this conversation states: "7-16-87. per Hugh Jenkins - they to issue warrants for arrest tomorrow. Requesting $10,000.00 bond. Will advise of preliminary hearing." (Ex.43). Jenkins testified there were no warrants at this time.

5. In a November, 1987 conversation between P. Mershon and Bennett (Beasley's supervisor) Bennett told P. Mershon "if it [the money] was paid, we would have no interest in that action down there" (Vol.III, p. 196) and would help in getting the criminal charges dropped.

6. After the preliminary hearing, Carolyn Mershon (Petitioners' mother) had a conversation with Bennett, Beasley, and Griffith in which she was told "if the boys would make restitution, they would drop the criminal charges - - or drop the charges for their arrest." (Vol. V, p.44). A few days later, Carolyn Mershon spoke with Jenkins and was told by him he could not drop the charges unless MFA agreed to drop them. (Vol. V, p. 49).

7. Even though MFA had no specific facts

Mershons had defrauded MFA, Bennett testified MFA contacted the prosecuting attorney's office about bringing the criminal charges because "we felt we were getting shafted in that we were not going to get paid." (Vol.III, p.195).

8. Griffith had familiarity with bankruptcy laws and knowledge of exceptions to bankruptcy for defrauding a secured creditor. Jenkins testified in 1986-1987 he was aware if the alleged crime of defrauding a secured creditor is proven, the individual cannot discharge that particular debt in bankruptcy. (Vol. IV, p.148).

9. Griffith joined Jenkins at counsel table during the preliminary hearing, even though by his own admission he had no purpose for being there. (Vol.

IV, p. 196).

10. At the preliminary hearing evidence was presented by Jenkins of a check, made payable to the Mershons, MFA and others with whited out signatures.[4]

The panel's majority opinion sets out "facts" not supported by the record: (1) the panel states after Jenkins removed himself from the case, the State attorney general's office pursued the matter; BUT, Jenkins testified the case was not pursued by the State. (Vol.IV, p.206-208). The reason it was not pursued was because he and his father had the first lien.[5] (Vol.IV, p.207-208). (2) the panel

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[4] The trial court stated the whited-out check could be considered as evidence of a scheme or agreement of wrongful acts on the part of MFA against Petitioners. (Vol. III, p. 111, 114).

[5] This last evidence was excluded by the trial court.

inaccurately states the Mershons deposited a check directly into their account. G. Mershon deposited one check.[6] (3) the panel inaccurately states a civil suit was filed after the Mershons had deposited money directly into their account. The civil suit was filed months later, on nonpayment of a promissory note, not on conversion.

II. PETITIONERS' RESPONSE TO RESPONDENT'S "CORRECTIONS"

As to Respondents' alleged "corrections", subparts A-K, Petitioners stand by the facts set forth in their Statement of Facts and provide the following citations to the record for these statements:

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[6] This is particularly relevant in that criminal proceedings were brought against C. Mershon and P. Mershon, even though the acts of one partner do not make the other partners criminally liable.

A. Petitioners' statement that "in 1985 MFA knew [the Mershons] were selling grain but no one from MFA ever called them and complained about MFA not getting money or their name being on the checks."

G. Mershon testified he and his brothers were always in communication with MFA employees Hicks and Beasley as to the status of the crop and how the operation was going. (Vol.I, p.67). Neither Hicks nor Beasley told G. Mershon to put MFA's name on the check. Mershons also sold grain at MFA's local elevators; the checks were issued while the grain was being brought to the elevators. (Vol. I, p. 66).

B. Petitioners' statement that W.K. Jenkins' lease "Provided all checks were to be made out to W.K. Jenkins/Green Acres Farm until the lease was paid in full".

Jenkins, Prosecutor as well as President of Green Acres Farms which was being farmed by the Mershons, testified the Mershons were in his and his father's home

in 1985 and 1986 to arrange for the lease. (Vol.IV, p.121). Beasley testified that prior to signing the criminal complaints he knew W. K. Jenkins had a first lien on the crops, that MFA recognized the first lien, and knew W. K. Jenkins had not yet been paid in full. ((Vol. V, p. 146).

C. Petitioners' Statement that Mershons "immediately informed the first secured creditor W.K. Jenkins, the check had been deposited" is in the record.

G. Mershon testified this check was cashed but that he took the check to W.K. Jenkins first and told him he needed to use the money for fuel. (Vol. I, p. 98-99).

D. Petitioners' description of Mershons' past practice with MFA is accurate and complete.

Petitioners' statement as to their past practice with MFA is supported by the record.[7] Respondents make a generalized

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[7] Petitioners' Br. at p. 16-17.

disclaimer while mentioning only one alleged "inaccuracy" -- that the only checks Mershons deposited into the bank were checks which were jointly payable to Mershons, MFA and the Farmers Home Administration ("FmHA").[8] Respondents' statement is incorrect because they refer to a few checks MFA put into evidence[9] which were made out jointly. (Vol.VI, p.26). The record shows other checks were made payable to the Mershons in their sole names and deposited in the Mershon Brothers Farms Account.[10] G. Mershon testified there had been checks with just the Mershon Brothers' names on them, which were cashed. (Vol.I, p.106)

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[8] Respondents' Br. at p. 4.

[9] Def. Exhibits DDD-10 through DDD-16.

[10] Def. Ex. D and E.

E. MFA states when they did endorse checks Mershons had to sign a partial release of collateral agreement.

On one occasion the Mershons signed a partial release of collateral agreement. This was the $1,919.98 check on which the Mershons names' were whited out and which MFA provided to Jenkins to be used at the preliminary hearing as alleged "evidence" of fraud. The record shows MFA signed off on other checks[11] but there were no other partial releases of collateral signed.

F. Respondents' claim that a photocopy of a $1,919.98 check was lost by Petitioners' counsel is not supported by the record.

Respondents' record reference does not support a check was "lost" by Petitioners' counsel Howard. The photocopy of the $1,919.98 check with the four endorsements[12] was made an exhibit at the

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11 Def. Ex. DDD-10-DDD-16

12 Plaintiffs' Ex. 21(c) and (d).

state preliminary hearing after Jenkins put into evidence the same check with two of the names "whited out." (Vol. V, p. 64). The exhibits from the state preliminary hearing were last seen in the state court's file, but were missing at the time of the District Court trial. (Vol.V, p.66). Carolyn Mershon, C. Mershon, and Howard, at trial described the original check and identified the photocopy as identical to the original and having the four endorsements on the check. (Vol. V, p. 27, 60, 62).

G. Petitioners' statement that the Bates County prosecutor sent "blank criminal complaints."

The criminal complaints when sent to MFA were blank as to date of complaint, date of alleged incident, and name of complainant. The fact these complaints were "blank" as to such crucial information, coupled with the fact that

Jenkins wrote Beasley a letter (Ex. 29, Vol.III, p.230) asking for the type and amount of grain sold, dates the grain was sold, and a description of the property where the grain was farmed shows the prosecutor had done no investigation. Beasley wrote back to Jenkins stating he did not know the information Jenkins was requesting (Ex. 52), yet Beasley still signed the "blank" complaint rather than waiting until the complaint was fully completed.

H. Petitioners' description of the events leading up to the signing of the criminal complaints is accurate and supported by the record.

The record supports Petitioners' description of the facts leading up to the signing of the criminal complaints. (Vol.III, p. 177-181, 188-196; Vol.VI, p. 107-112, 114-118).

I. Petitioners' description of the state court preliminary hearing[13] is accurate and supported by the record.

The record supports Petitioners' description of the state court preliminary hearing.(Vol. II, p. 93, 95; Vol.III, p. 183, 224-225; Vol.IV, p.138, 154-155, 164, 196; Vol. V, p. 139-141, 159, 163-164, 167-168, 172; Pre. Hrg. Tr. at 23-24, 108, 111-112, 133; (Ex. 21C [the whited out check]; Ex. 101).

J. Petitioners' statement that the criminal charges against them were dismissed with prejudice.

In 1990 the State prosecutor filed a nolle prosequi on all of the charges at the State's costs. (Pl. Ex. 61, 61(a), 61(b)). The charges were never refiled. The lack of refiling the case is evidence the case was abandoned.

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13 Petitioners Br. at pp. 38-45.

K. Petitioners' statement that they attempted to introduce evidence of a "pattern and practice" of seeking criminal prosecution against other defaulters.

Contrary to MFA's assertion, the statement is not false and misleading. Mershons attempted to present such evidence but it was excluded by the trial court. (offer of proof at Tr. Vol. V, p. 77-82; Ex.164 & 165).[14] In these excluded defaulting debtors' files were letters showing the debtors' intent to discharge in bankruptcy and MFA's attempt to coerce payment under threat of criminal

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[14] The panel incorrectly states (App. C-12) petitioners offered no evidence that MFA had sought criminal prosecution of other defrauding debtors in the past or that the prosecutor had filed criminal charges in the past against other debtors who had defaulted on MFA loans. To rely upon evidence excluded by the trial court certainly is a miscarriage of justice.

prosecution. (Vol. V, p. 77-82). The files also showed MFA through Beasley and Griffith were pursuing civil collection while simultaneously pursuing criminal charges for defrauding a secured creditor--the same pattern as in the Mershon case.

ARGUMENT

The panel's opinion is contrary to the Eighth Circuit's standard of review set out in Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985) and Dace v. ACR Industries, Inc., 722 F.2d 374 (8th Cir. 1984). The conflicts in the evidence are required to be resolved in Petitioners' favor. This was not done. Instead the panel, with no mention of the standard of review, improperly engaged in a de novo review.

As to the quote by Cooper in respondents' brief, Cooper also stated:

> Such strict limits on the judicial power to control jury verdicts have been developed in large measure because of the preferred position assigned to the jury by Constitution and tradition. The preservation assigned to the jury by the seventh amendment includes the basic division of functions ascribing the task of fact--finding to the jury and the task of lawgiving to the judges". (quoting from Baltimore & C Line v. Redman, 295 U.S. 654, 657 (1935). (At 906)

At 916:

> . . .the vital aspect of jury trial is that the jury be allowed to perform the factfinding part of adjudication. (citing Galloway v. United States, 319 U.S. 372 (1943).

And at 921:

> Traditional respect for the jury and its constitutional benison requires that it be allowed to find whatever facts are reasonably suggested by the evidence. The impossibility of defining reasonableness requires that the scope of freedom be left large.

There was a legally sufficient evidentiary basis for the jury's finding of liability against MFA, Beasley and Griffith under 42 U.S.C. Sec. 1983 under the "joint engagement" test set out by this Court in

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) and Dennis v. Sparks, 449 U.S. 24 (1980). The jury heard the facts--including those facts which the panel omitted in its majority opinion-- and made a rational decision from the sequence of events that the state actor (Jenkins) and the private parties (MFA, Griffith, and Beasley) reached a "meeting of the minds" and were "jointly engaged." Black's concurring opinion in Adickes said "conspiracy" is a factual question for the jury. The sequence of events created a substantial possibility of a conspiracy.

Rule 50 is not a reevaluation of the evidence. If the party has sufficient evidence to survive summary judgment and motions for directed verdict, then the trial court should so rule rather than take a "wait and see" attitude on the verdict and then if the trial court does not agree

with the verdict, rule "insufficiency of the evidence". The standard of review cannot be ignored because to do so impermissibly invades the province of the jury.

At the very least this Court should grant a new trial to permit the admission of the evidence of "pattern and practice". To affirm this egregious finding is to take yet another step away from a meaningful "trial by jury".

Petitioners have no other avenues to see justice served. MFA abused the court system, violated constitutional rights, and got off scott-free. Justice has not been served in this case but has been subverted.

CONCLUSION

For the foregoing reasons and for those stated in the Petition Petitioners reiterate their request for relief.

Respectfully submitted,

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